Answer-to-Question-_Section B, # 2_

Although there is not necessarily a duty for parties to a contract to act in good faith under formal contract doctrine, courts have implied a duty of good faith in three primary ways: to find consideration, to enforce a duty to negotiate in good faith, and through promissory estoppel. First, courts have implied a duty of good faith in order to find sufficient consideration in cases where a breaching party claims the contract is really an illusory promise. This can be seen in Mattei v. Hopper, Structural Polymer v. Zoltek, and Wood v. Lucy, Lady Duff Gordon. Second, courts have either implied or enforced a duty to negotiate in good faith in Channel Homes and in Siga v. Pharmathene. Furthermore, in contexts in which courts do not imply good faith in order to find an enforceable contract, they may still hold parties liable for bad faith behavior, as seen in Hoffman v. Red Owl and Wright v. Newman. When courts imply a duty of good faith in large part has to do with context - contracts in business contexts, for instance, are interpreted differently than those in the family context. But it seems that in each context, the role good faith plays relates to a broader policy idea of how enforcing contracts relates to controlling behavior- by implying a duty of good faith, courts can dis-incentivize opportunism in business relations and bad faith dealings. Through promissory estoppel, they can further aim to create more just social policy, particularly in the family context. Yet, as contracts must also be interpreted and enforced based on formal contract doctrine, and parties should be able to create their own terms of contracts (not just want the court thinks is just) - so there are limits to the role good faith can play.

1. Good Faith in Illusory Promise Cases

In ***Mattei v. Hopper***, there was a satisfaction clause in a contract for the sale of a tract to land, meaning that the contract was conditional on the plaintiff obtaining leases that were satisfactory to her. When the defendant breached the contract, she claimed that this satisfaction clause made the promise illusory, or lacked consideration. In an illusory

promise, the promisor has no actual obligation to do anything, but rather, can choose to or not to abide by the promise. Despite the flexibility the satisfaction clause lended, the court held that there was an implied good faith obligation that created consideration. This obligation to act in good faith would be measured by an objective standard, or a "reasonable person" standard, meaning that the plaintiff could not back out of the contract by using the satisfaction clause unless a reasonable person in her position would not find the leases to be satisfactory. Similarly, particularly in the sale of goods context, requirement and output contracts have been found to have an implied obligation of good faith in order to keep them from being illusory promises. UCC § 2-306 specifically states the requirements and output contracts do have a duty of good faith.

This issue arose in ***Structural Polymer v. Zoltek***, which was a contact in which Zoltek agreed to supply all of Structural Polymer's carbon fiber requirements. The obligation to act in good faith places a limit on the quantity Structural Polymer can require. There the contract did have a limit that Structural Polymer could not demand over one million pounds more than they purchased the year before. However, ordering over a million pounds than they ordered in the past would seem to be bad faith - for how could Zoltek be expected to provide millions more pounds of large-tow carbon fiber, when they likely have limited manufacturing capacity and resources themselves? Along similar lines, in ***Wood v. Duff Gordon***, Judge Cardozo found there to be consideration in a contract in which Duff Gordon gave Wood the exclusive right to place her endorsements on fashion designers. Because Duff Gordon's profits depended on Wood selling her endorsements, Cardozo reasoned that she must have reasonably believed that he would make a good-faith effort to sell her label.

In each of these cases, the defendant who breached the contract used the argument that it was an illusory promise in order to get out of their contractual duties. Thus, the fact the courts found good faith to be implied into these agreements may have more to do with an idea that the breacher was opportunistically trying to get out of their contractual obligations, than with anything ineherently in these types of contracts. As Judge Posner said in ***Union Carbide***, you can't get out of a contractual obligation that you agreed to just because performing that obligation has become hard to you. This seems to be the

trend in these cases - one party uses a clause in the contract to find their way out, despite the fact that they knew the clause was a part of the contract when they initially agreed. Moreover, each of these cases is in a commercial context. Therefore, it seems that by implying a good faith obligation into these contracts, the court is aiming to prevent opportunism in business dealings.

How good faith plays out differently in different context can be seen by comparing these three cases to ***Kirksy v. Kirksy***. In Kirksy, an brother-in-law told his widowed sister in law that because he "feels like [he] wants her and her children to do well," they should move onto his land and he would proivde a home for them. After providing them with a home for a few years, he kicked them out and failed to fulfill his promise, claiming that the promise was illusory and lacked consideration. There, in a family setting, the court did not imply a duty of good faith, and the promsie was not enforced. If implying a duty to act in good faith relates to preventing opporutnism, why emphasize it more in the business context than in the family context? Although allowing such bad faith in family promises does seem to be a negative social policy, proomissory estoppel (although not used in Kirksy) may ameliorate that problem. Yet the diffference in context here may stem from an idea that courts are more willing to find enforceable contracts in business settings, where parties are generally thinking about transacting on contractual terms. Moreover, courts have traditionally viewed family contexts as being in the "private" realm that they avoid intervening in (this can be seen by, for instance, the fact that marital rape was not illegal in the U.S. until the 1970s). While not every promise should be enforceable, and there is a limit to what extent courts can use good faith to find consideration, courts do not operate alone. If courts throughout the country are mkaing decisions in which they imply a duty of good faith, and hold parties liable for opportunistic behavior, that would likely have positive social policy ramifications. Still- contract law is as much about fairness as it is about formalities, and formally speaking, parties should not be held to contractual obligations that they did not agree to, and it should not be assume that all parties to contracts have agreed to act in good faith.

2. Good Faith in Pre-Contract Negotiations

Another area of contract law which we have seen good faith play a role in is in cases on pre-contract liability. In ***Channel Homes***, a home improvement store was negotiating with a real estate developer to lease a location in a mall he was developing. As per the developer's request, Channel Homes drafter a letter of intent regarding their negotiations. Although it did not have an express duty for the parties to negotiate in good faith, the letter of intent helped the developer obtain financing for the mall, so there was consideration. Yet, after carrying out negotiations for a significant period of time, the real estate developer pulled out of their negotiations with Channel Homes in order to lease the location to one of their competitors, who agreed to pay a higher price. Although no formal agreement had been completed between Channel Homes and the developer, the court implied a binding obligation to negotiate in good faith, because both parties had manifested intent to be bound to their negotiations. Like the illusory promise cases, the court here seems to be finding a duty to negotiate in good faith in order to prevent opportunism in a business dealing. While this likely is a positive social policy, it does raise questions regarding economic efficiency.

Law and economics scholars have ideas such as the hypothetical bargian, which is that courts should enforce a contract based on what agreement the parties would negotiate for themselves if parties behaved rationally. It does not seem that the real estate developer would have chosen to carry out his promise to Channel Homes, as he breached their agreement to agree by deciding not to. There is also the notion of efficient breach, which is that if a party can make more from another party, and can profit even if they pay the promisee the remedy they will owe them from breaching the contract, they should breach. This stems from the idea that it would be a win-win, since the promisee obtains the remedy, the promisor profits, and the new party gets to become a part of a contract with the promisor. This could have been the case in Channel Homes, although it is not clear from the facts of the case. If it were, a question arises over whether the court should still have obligated the developer to negotiate with Channel Homes in good faith. Likely, it still would be good social policy for the courts to imply a duty of good faith here because even if it was an efficient breach, that stll promotes opportunistic behavior. Opportunism may problematic for business dealings as a whole, because parties might be warry to enter negotiations in the future if courts were allowing parties to suddenly end

negotiations for bad faith reasons. Yet this also raises a question about what the role of the courts is, and whether they should play a role in social and economic policy.

Somewhat similarly, in ***Siga v. Pharmathene***, the court enforced an obligation to negotiate in good faith. Unlike in Channel Homes, however, both the bridge loan agreement and the merger agreement had an exprses obligation to negotiate in good faith written into the terms of the contracts. Therefore, unlike the other cases, the court made no reach to find good faith, but was merely enforcing the terms that the parties to the contract chose to set out for themselves.

Still, there was significant backlash from companies in response to Siga v. Pharmathene, in which companies put out press releases instructing negotiaters to put an express term in their negotiation forms to indicate that they do not intend to be bound to negotiate in good faith. This raises a question of whether courts are finding too many promises to be enforceable- should parties to a negotiation really have to spell out that they don't intend to be legally bound?

Neverhtless, it still seems that enforcing the duty to negotiate in good faith in Siga is in line with both formal contract theory, and braoder policy goals. Under a subjective theory of contract, the court was enforcing terms the parties chose to include in the agreements. Under an objective theory, anyone in Pharmathene's position would have reasonable believed that Siga was agreeing to negotiate in good faith, as they signed the forms with that term. Moreover, if Siga were allowed to breach the contract with Pharmathene, merely because they were no longer undergoing economic hardship and did not need Pharmathene anymore, that would send a message to future companies in Pharmathene's position not to enter this type of negotiation. Siga was producing an antiviral vaccine for smallpox. Had Pharmathene not helped them in a time of financial crisis, perhaps that vaccine would not have been produced, which would have significant ramifications for public health and policy if transactions like this did not occur in the future.

3. Promissory Estoppel

Both Channel Homes and Siga v. Pharmathene, like cases where courts implied good faith to find consideration, are in the business context. Therefore, courts were likely more inclined to find enforceable contracts because even in Channel Homes, both parties were probably thinking in terms of contracts and legally binding rights. Contracts also are more likely to be found in business contexts because the parties are more likely to have experience regarding contracts. For instance, the UCC has a more liberal approach to policy making than the common law, because it deals with the sale of moveable goods, and vendors habitually make contracts. Furthermore, within the UCC, contracts are found even more easily when the parties are merchants, as exemplified by the fact that under UCC § 2-207, additioanl terms become a part of contracts where both parties are merchants, whereas they are only proposals if they are not merchants. This is because under UCC § 2-104, merchants hold themselves out as having knowledge or expertise, which may create creater contractual liability.

Therefore, it does seem fair to imply good faith in order to make contracts enforceable in the business context. Yet in the family context, where there are often higher standards for the presence of contract formalities in order to find an enforceable contract (Kirksy), courts cannot imply good faith as frequently through contract law. Nevertheless, promissory estoppel allows courts to award remedies where parties rely on a promise to their detriment, and enforcing the promise is necessary in order to avoid injustice (Restatement § 90), even when no formal contract is found.

This may not make as much sense in the business context, where contracts are found more easily. Yet in the family context, promissory estoppel can serve the important function that implying good faith in business dealing serves in commercial contexts: it can be used to create liability for bad faith behavior. For instance, in ***Wright v. Newman***, a father put his name on a child's birth certificate, and acted as his father for several years, although he was not his biological or adoptive parent. Through a promissory estoppel theory, the child's mother was able to obtain a remedy for child support from the father after he abandoned her child. Although promissory estoppel is not expressly about

prevending bad faith, imagine the bad faith ramifications that would result from a different decision. There are likely many children around the country in a similar situation, and by holding the father liable for paying child support here, that sends a signal to other parents in this situation nationwide.

In ***DG Stout v. Bacardi***, relance damages were awarded to DG Stout on a promissory estoppel theory because DG Stout did not sell out to National on reliance on a promise that Bacardi would continue to use them as their distributor. When Bacardi backed out on this promise, DG Stout could not sell their company at the same price anymore. However, from a policy standpoint, promissory estoppel to prevent bad faith here seems less logical. It is important in the business context, where parties do engage in contracting regularly, that there is certainty in contract law. Companies in DG Stout's position in the future now may not be as inclined to get the promise in writing, and to abide by formalities of contract law. This is different than in Wright v. Newman, where it would be absurd to expect mothers to have fathers who arent the biological father sign a contract to pay child support for the child's entire lif. Thus, while promissory estoppel can be a useful tool to promote good faith, it does not apply equally in every context.

4. Conclusion

Thus, good faith plays a significant role, both in where courts use it to find contracts to be enforceable, and when they use promissory estoppel to hold parties who act in bad faith liable. While genearlly, preventing opportunism and promoting good faith is a positive policy consequence of these decisions, it also raises more complex issues. For instance, how do we define bad faith? For Easterbrook, it's "trickery and obduracy." But is Siga pulling out of their negotiations with Pharmathane really an example of "trickery"? It seems different judges may define bad faith and opportunism differently. Moreover, contract law ultimately is about enforcing the rights of parties that they contracted to. While there is also an objective theory of contract law, which looks at contracts from a reasonableness standard, the duties on parites still primarily come from those they set for themselves. In the illusory promise cases, implying good faith does not seem to change the nature of the original promise, as it seems likely that when the parties

agreed to the contract, there was an implication of good faith already there. As Judge Cardozo said in Wood, a promise may be lacking, and yet the whole thing is "instinct with obligation." Nevertheless, promissory estoppel cases may be less rooted in good faith at the outset, and liability may come more from the court's idea of injustice than from what the parties had in mind themselves. Nevertheless, promissoy estoppel is a discretionary remedy, used only to avoid injustice, and thus can postively promote good faith in contexts such as the family contexts where courts are less likely to find enforceable contracts. Ultimately, both the idea of good faith in contract law and promissory estoppel seem to stem form an idea of how contract law can be used to promote certain types of social behavior - for society at large, protecting good faith and dis-incentivizing opportunism seems, overall, to be a good thing.